

## United States District Court

EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

UNITED STATES OF AMERICA

v.

VICETH RATH

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Case Number: 4:05-CR-076

Judge Mazzant

### **MEMORANDUM OPINION & ORDER**

Pending before the Court is Defendant Viceth Rath's Motion for Compassionate Release (Dkt. #310). The Court, having considered the Motion, the record, and the applicable law, finds that the motion must be **DENIED**.

#### **I. BACKGROUND**

On October 19, 2005 Defendant Viceth Rath ("Rath") pleaded guilty to: (1) Conspiracy to Manufacture, Distribute or Possess with the Intent to Manufacture, Distribute or Dispense Methamphetamine, 3,4 MDMA a violation of 21 U.S.C. § 846; (2) Use or Carry or Possession of a Firearm During, in Relation to, and in Furtherance of a Drug Trafficking Crime, a violation of 18 U.S.C. § 924(c)(1); and (3) Aiding and Abetting, a violation of 18 U.S.C. § 2. Rath's role in the conspiracy involved delivering methamphetamine and MDMA for sale. Rath was also knowingly in possession of a Smith & Wesson Model SW4OVE, .40 caliber semi-automatic handgun, Serial Number PBL8119 while in possession of methamphetamine with the intent to distribute. The Court sentenced Rath to 302 months' imprisonment. Rath is serving his sentence at USP Atlanta. *See* <https://www.bop.gov/inmateloc/> (Register Number: 12157-078). The Bureau of Prisons ("BOP") projects he will be released by December 9, 2026. *Id.*

Rath seeks compassionate release based on amendments to the “stacking” provisions contained in 18 U.S.C. § 924, arguing the changes constitute “extraordinary and compelling reasons” to grant a sentence reduction (Dkt. #142). The Government has not responded.

## II. LEGAL STANDARD

A judgment of conviction imposing a sentence of imprisonment “constitutes a final judgment and may not be modified by a district court except in limited circumstances.” *Dillon v. United States*, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. § 3582(b)); *see also* 18 U.S.C. § 3582(c). One such circumstance arises from 18 U.S.C. § 3582(c)(1)(A), the statute authorizing compassionate release. Under § 3582(c)(1)(A), a district court may grant a sentence reduction if it finds: (1) a defendant “fully exhausted all administrative rights”; (2) “extraordinary and compelling reasons warrant such a reduction”; (3) “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission”; and (4) such a reduction is appropriate “after considering the factors set forth in § 3553(a) to the extent that they are applicable.” 18 U.S.C. § 3582(c)(1)(A).

The First Step Act of 2018 made the first major changes to compassionate release since its authorization in 1984. Pub. L. 115-391, 132 Stat. 5194. Procedurally, the First Step Act removed the Director of the BOP as the sole arbiter of compassionate release. Instead, the law enabled a defendant to move for compassionate release directly in district court after exhausting their administrative rights. 18 U.S.C. § 3582(c)(1)(A). Prior to this change, the BOP retained sole gatekeeping authority over compassionate release petitions. *United States v. Brooker*, 976 F.3d 228, 232 (2d Cir. 2020). This resulted in underuse and mismanagement.<sup>1</sup> *Id.* Through the First

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<sup>1</sup> In 2013, a report from the Office of the Inspector General revealed that the BOP granted compassionate release to only an average of 24 incarcerated people per year. *See* U.S. Dep’t of Just. Office of the Inspector General, *The Federal Bureau of Prisons’ Compassionate Release Program* 1 (2013), <https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf> (last visited April 14, 2020). And of the 208 people whose release requests were approved by both

Step Act, Congress sought to mitigate this by “increasing the use and transparency of compassionate release” Pub. L. 115-391, 132 Stat. 5194, 5239 (capitalization omitted).

Substantively, the First Step Act also modified the “extraordinary and compelling reasons” determination. Congress never defined what constitutes “extraordinary and compelling,” but rather delegated this determination to the Sentencing Commission.<sup>2</sup> By the text of § 3582(c)(1)(A), any sentence reduction must be “consistent with applicable policy statements issued by the Sentencing Commission.” However, since passage of the First Step Act, the Sentencing Commission has not updated its guidelines on compassionate release.<sup>3</sup> This has created significant disagreement across the country whether the pre-First Step Act policy statement is still “applicable,” and thus binding on district courts.

The Fifth Circuit recently joined the Second, Fourth, Sixth, Seventh, and Tenth Circuits in concluding that § 1B1.13 is no longer binding on a district court. *See United States v. Shkambi*, 2021 WL 1291609, at \*4 (5th Cir. 2021) (“The district court on remand is bound only by § 3582(c)(1)(A)(i) and, as always, the sentencing factors in § 3553(a). In reaching this conclusion, we align with every circuit court to have addressed the issue.”). Under this new framework, § 1B1.13 still binds district courts on motions made by the BOP, but, for motions made directly by an inmate, district courts are free to consider any relevant fact in determining if “extraordinary and compelling reasons” exist. *See Brooker*, 976 F.3d at 235–36 (because the First Step Act allows

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a warden and a BOP Regional Director, 13% died awaiting a final decision by the BOP Director. *Id.*; *see also Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 868 (2009) (noting that, in the 1990s, 0.01 percent of inmates annually were granted compassionate release).

<sup>2</sup> In 28 U.S.C. § 994(a)(2), Congress granted the Commission broad authority to promulgate “general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in [18 U.S.C. § 3553(a)(2)].” And in 28 U.S.C. § 994(t), “Congress instructed the Commission to ‘describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.’” *United States v. Garcia*, 655 F.3d 426, 435 (5th Cir. 2011) (quoting 28 U.S.C. § 994(t)).

<sup>3</sup> The Sentencing Commission currently lacks a quorum to issue new guidelines.

both inmates and the BOP to file compassionate-release motions under § 3582(c)(1)(A), § 1B1.13 now applies only when such motions are made by the BOP and is inapplicable when a compassionate-release motion is made by a defendant); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020) (“A sentence reduction brought about by motion of a defendant, rather than the BOP, is not a reduction ‘under this policy statement.’”); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (agreeing with *Brooker* and holding that there is no “applicable” policy statement for § 3582(c)(1)(A) motions after the First Step Act); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020) (“Until the Sentencing Commission updates § 1B1.13 to reflect the First Step Act, district courts have full discretion in the interim to determine whether an ‘extraordinary and compelling’ reason justifies compassionate release”).

Despite this newfound discretion, district courts are not without guidance in determining whether “extraordinary and compelling reasons” exist. First, Congress has explicitly limited that “[r]ehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason.” 28 U.S.C. § 994(t) (emphasis added). Second, the Sentencing Commission’s policy statement and commentary is still persuasive. *United States v. Logan*, No. 97-CR-0099(3), 2021 WL 1221481 (D. Minn., Apr. 1, 2021) (finding that § 1B1.13’s definition of “extraordinary and compelling” should be afforded “substantial deference . . . as such deference is consistent with the intent (even if not mandated by the letter) of § 3582(c)(1)(A)”). Application Note 1 of the policy statement provides that “extraordinary and compelling reasons” exist when: (1) a terminal illness or other medical condition “substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility”; (2) a defendant, who is at least 65 years old, “is experiencing a serious deterioration in physical or mental health because of the aging process” and “has served at least 10 years or 75 percent of his or her term of imprisonment”;

and (3) a defendant has minor children without a caregiver or with an incapacitated spouse or partner who needs the defendant to be the caregiver. U.S.S.G. § 1B1.13, n.1(A)-(C). Lastly, BOP Program Statement 5050.50 (“PS 5050.50”), amended after passage of the First Step Act, describes the factors BOP considers grounds for compassionate release. *See* PS 5050.50 ¶¶ 3–6. These grounds are similar to the reasons identified by the Sentencing Commission, but also include a list of factors like rehabilitation and circumstances of the offense.<sup>4</sup> *Id.*

Building from this guidance, district courts across the country have identified additional situations where “extraordinary and compelling reasons” exist. First, while rehabilitation alone is not an “extraordinary and compelling” reason for a sentence reduction, it can be a significant factor warranting a sentence reduction when an inmate has an otherwise qualifying condition.<sup>5</sup> *See United States v. Rodriguez*, 451 F.Supp.3d 392, 405 (E.D. Pa. 2020) (noting that the Sentencing Commission itself interpreted § 3582(c)(1)(A) as allowing consideration of an inmate’s rehabilitation). If an inmate demonstrates a long, comprehensive record of rehabilitation, it goes to whether injustice would result if they remained incarcerated. *See Brooker*, 976 F.3d at 238 (identifying “the injustice of [a] lengthy sentence” as a factor that may weigh in favor of a sentence reduction). Second, courts consider any changes in law and the sentencing guidelines when determining if a sentence is extraordinary. For example, courts grant compassionate release at a remarkable rate for inmates subject to the now abolished § 924(c) sentence-stacking. *See McCoy*, 981 F.3d at 285 (“As the court observed in *Bryant*, multiple district courts have concluded that the

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<sup>4</sup> PS 5050.50’s nonexclusive factors are: “the defendant’s criminal and personal history, nature of his offense, disciplinary infractions, length of sentence and amount of time served, current age and age at the time of offense and sentencing, release plans, and ‘[w]hether release would minimize the severity of the offense.’” *United States v. Saldana*, 807 F. App’x 816, 819 (10th Cir. 2020) (quoting PS 5050.50 ¶ 7).

<sup>5</sup> 18 U.S.C. § 3142(g) aids the Court in determining whether a defendant is a danger to the community. Applicable factors include: “the nature and circumstances of the offense,” “the person’s character, physical and mental condition, family ties, employment, . . . criminal history,” and “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.” 18 U.S.C. § 3142(g).

severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today, can constitute an “extraordinary and compelling” reason for relief under § 3582(c)(1)(A)). Though Congress did not retroactively eliminate § 924(c) sentence-stacking, courts consider whether the outdated policy warrants relief on a case-by-case basis.<sup>6</sup>

Even if extraordinary and compelling reasons exist, they must outweigh the 18 U.S.C. § 3553(a) factors to warrant sentence reduction. *See* 18 U.S.C. § 3582(c)(1)(A). These factors are:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and sentencing range [provided for in the U.S.S.G.] . . .
- (5) any pertinent [Sentencing Commission] policy statement . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

*Id.* § 3553(a).

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<sup>6</sup> *See* Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 123–24 (2019) (arguing Congress did not make § 924(c) sentence stacking retroactive because it did not want to make all inmates “*categorically*” eligible for sentencing relief, but Congress meant for relief from draconian sentences to apply “*individually*”).

### III. DISCUSSION

Rath moves for compassionate release based on a change in current law that warrants a sentence reduction. The Government has not responded. Although Rath has met § 3582(c)(1)(A)'s exhaustion requirement, he has not met the statute's requirement that "extraordinary and compelling reasons" exist warranting a reduction of his sentence. Rath's motion, therefore, must be denied.

#### A. Rath Has Met Section 3582(c)(1)(A)'s Exhaustion Requirement.

Rath's compassionate release motion may only be considered if he first meets § 3582(c)(1)(A)'s exhaustion requirement. Courts may not consider a modification to a defendant's sentence under § 3582(c)(1)(A)(i) unless a motion for such a modification is properly made by the Director of the BOP or by a defendant who has fully exhausted their administrative remedies. 18 U.S.C. § 3582(c)(1)(A). Fully exhausting administrative remedies requires a denial by the warden of a defendant's facility or waiting thirty days without receiving a response to a request, whichever is earlier.<sup>7</sup> *Id.*

Section 3582(c)(1)(A)'s exhaustion requirement is not waivable. *See United States v. Rivas*, 833 F. App'x 556, 558 (5th Cir. 2020) ("Because the statutory language is mandatory—that a prisoner must exhaust their BOP remedy before filing in district court—we must enforce this procedural rule . . ."). If a defendant has not sought relief from the BOP, or has not waited thirty days since seeking relief, the Court may not consider their motion.

On July 2, 2020, Rath asked the warden at his institution of confinement to grant him compassionate release (Dkt. #307, Exhibit 1). More than thirty days have passed without receiving

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<sup>7</sup> BOP regulations define "warden" to include "the chief executive officer of . . . any federal penal or correctional institution or facility." 28 C.F.R. § 500.1(a); *United States v. Franco*, 973 F.3d 465, 468 (5th Cir. 2020); *c.f. United States v. Campagna*, 16 Cr. 78-01 (LGS), 2020 WL 1489829, at \*3 (S.D.N.Y. Mar. 27, 2020) (holding that "the denial of Defendant's request by the Residential Re-entry Manager suffices to exhaust his administrative rights").

a response to his request. Therefore, Rath has met § 3582(c)(1)(A)'s exhaustion requirement.

**B. Rath Has Not Met Section 3582(c)(1)(A)'s Requirement that “Extraordinary and Compelling Reasons” Warrant a Sentence Reduction.**

Rath's compassionate release motion turns on whether the now abolished § 924(c) sentence-stacking provision applies here. Rath's claim fails since he has only been convicted under a single § 924(c) offense.

The Court has discretion to decide whether Rath's conditions present “extraordinary and compelling reasons” warranting a sentence reduction. *See Shkambi*, 2021 WL 1291609, at \*4. The Court is not bound by the Sentencing Commission's policy statement and may consider any relevant facts in evaluating Rath's condition of incarceration. *Id.* Typically, courts consider whether a defendant suffers from a serious health condition, has a record of rehabilitation, the nature and circumstances of defendant's offense, and whether a sentence is based on outdated law. *See Brooker*, 976 F.3d at 238.

Rehabilitation alone cannot support a claim for sentence reduction but may be considered as a factor in evaluating “extraordinary and compelling reasons.” *See Id.* at 237–38; *see also United States v. Hudec*, No. 4:91-1-1, 2020 WL 4925675, at \*5 (S.D. Tex. Aug. 20, 2020). Here, Rath offers no evidence that he has made strides towards rehabilitation. Accordingly, the Court finds that Rath's rehabilitative record does not support his release. Furthermore, Rath has not asserted that he suffers from a serious health condition.

At the time of Rath's sentencing, conviction on a charge pursuant to § 924(c) imposed a mandatory-minimum 60-month sentence for conviction of a first § 924(c) offense, and additional mandatory-minimum 240-month sentences for conviction on each additional § 924(c) offense. The law required a defendant's sentences to be served consecutively, hence the term “stacking.” This rule has led to significant terms of imprisonment not necessarily commensurate with the



underlying offense. *See* U.S. SENTENCING COMM., *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) (explaining that the former application of § 924(c) could “lead to sentences that are excessively severe and disproportionate to the offense committed”). However, Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (“FSA”), eliminated the stacking feature in cases where a defendant did not have a previous final conviction for a § 924(c) charge at the time of the new § 924(c) offense or offenses.

Rath fails to show his sentencing is based on a § 924(c) stacking that would warrant compassionate release. Rath was convicted under two counts, one of a violation of 21 U.S.C. § 846 and another of 18 USC § 924(c)(1). For the relevant provision to apply, the defendant must have received a sentencing that was “stacked” of multiple offenses committed under 18 USC § 924(c)(1). *See* First Step Act of 2018 § 403, S.756, 115th Cong. (2018). As Rath was only sentenced under a single § 924(c) offense, his claim that he was the subject of now abolished “stacking” fails.

Rath has failed to show that his sentence was based on outdated law, or why any of the other possible factors support compassionate release in his case. *See United States v. Stowe*, No. CR H-11-803(2), 2019 WL 4673725, at \*2 (S.D. Tex. Sept. 25, 2019) (citation omitted) (stating that the defendant generally “has the burden to show circumstances meeting the test for compassionate release”).<sup>8</sup>

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Under the rule of finality, federal courts may not “modify a term of imprisonment once it has been imposed” unless one of a few “narrow exceptions” applies. *Freeman v. United States*, 564 U.S. 522, 526 (2011) (citing 18 U.S.C. § 3582(c)) (plurality op.); *see also Dillon*, 560 U.S. at

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<sup>8</sup> Given Defendant’s failure to meet § 3582(c)(1)(A)’s requirements, the Court need not address whether the applicable 18 U.S.C. § 3553(a) factors support a sentence reduction.

819 (same). Compassionate release is one of those exceptions, but a defendant must conform both to the procedural and substantive requirements of § 3582(c)(1)(A) for a court to modify a sentence. Because Rath has failed to meet the controlling requirements for compassionate release set forth in § 3582(c)(1)(A)(i), his Motion must be denied.<sup>9</sup>

#### IV. CONCLUSION

It is therefore **ORDERED** that Defendant's Motion for Compassionate Release (Dkt. #142) is **DENIED**.

**IT IS SO ORDERED.**

**SIGNED this 29th day of September, 2021.**

  
AMOS L. MAZZANT  
UNITED STATES DISTRICT JUDGE

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<sup>9</sup> In the alternative, the Court is also unable to order home confinement. The BOP has exclusive authority to determine where a prisoner is housed; thus, the Court is without authority to order home confinement. 18 U.S.C. § 3621(b); *see also United States v. Miller*, No. 2:17-CR-015-D (02), 2020 WL 2514887, at \*1 (N.D. Tex. May 15, 2020) (“[N]either the CARES Act nor the First Step Act authorizes the court to release an inmate to home confinement.”).